No. 89-898

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

BYWATER NEIGHBORHOOD ASSOCIATION,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA, CRESCENT CITY COMMUNICATIONS COMPANY, INC. OF DELAWARE, AND NOTEL, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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Pursuant to Rule 37.2 of the Rules of this Court, the National Trust for Historic Preservation in the United States (hereinafter, National Trust) submits this brief as *amicus curiae* in support of the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.[1] This *amicus* brief addresses only the first question presented in the petition for a writ of certiorari, which relates to the jurisdiction of federal district courts over actions to enforce the National Historic Preservation Act and the National Environmental Policy Act against the Federal Communications Commission.

INTEREST OF AMICUS CURIAE

Congress chartered the National Trust in 1949 as a private, nonprofit organization to promote public involvement in the protection of America's historic resources and to further the historic preservation policy of the United States. *See* 16 U.S.C. § 468 (1988). The National Trust currently has more than 225,000 individual and 3,000 organizational members nationwide. In furtherance of its goal of preserving historic resources, the National Trust seeks to ensure compliance by the Federal Communications Commission (hereinafter, FCC) and other federal agencies with the National Historic Preservation Act (hereinafter, NHPA), 16 U.S.C. §§ 470 to 470w-6 (1988), and the National Environmental Policy Act (hereinafter, NEPA), 42 U.S.C. §§ 4321-4370a (1982 &

[1] The parties have consented to the appearance of the National Trust as *amicus*. Letters of consent from their counsel have been filed with the Clerk of this Court.

Supp. 1987). Conflicting and uncertain interpretations of statutes governing the proper forum for judicial review of agency noncompliance with NHPA and NEPA can, the National Trust believes, preclude effective enforcement of these statutes. That enforcement problem is evident in this case.

STATEMENT OF THE CASE

In this case, Crescent City Communications of Delaware (hereinafter, Crescent City) applied for an FCC license to broadcast from a 200-foot Studio Transmitter Link (STL) microwave tower to be used in conjunction with a new television broadcast station in New Orleans. The tower was to be built in the Bywater Historic District, near the historic French Quarter in New Orleans. The Bywater Historic District is listed in the National Register of Historic Places.[2] Pursuant to the FCC's "one-step" licensing procedure,[3] the agency allowed Crescent City to begin construction of the tower without a construction

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[2] *See* National Register of Historic Places; Annual Listing of Historic Properties for Fiscal Years 1986 and 1987, 53 Fed. Reg. 18,658, 18,673 (1988).

[3] *See, e.g.*, Licensing Procedures and Reporting Requirements in the Cable Television Relay Service, 50 Fed. Reg. 23,417, 23,418 (1985). Similar one-step procedures have been adopted by the Interstate Commerce Commission and the Nuclear Regulatory Commission. *See* 49 U.S.C. §§ 10903-10904 (1982 & Supp. 1987) (streamlined procedure for abandoning "exempt" rail lines); Early Site Permits; Standard Design Certifications; and Combined Licenses for Nuclear Power Reactors, 54 Fed. Reg. 15,372 (1989) (one-step permitting for nuclear power reactors).

permit, while the FCC was considering Crescent City's application for a broadcasting license.

The Bywater Neighborhood Association (hereinafter, Neighborhood Association) filed a complaint in the United States District Court for the Eastern District of Louisiana, seeking to enjoin construction of the tower. The Neighborhood Association alleged that the FCC had a nondiscretionary duty to comply with NHPA and NEPA before allowing Crescent City to construct the tower.[4] The district court dismissed the complaint for lack of subject matter jurisdiction, holding that the United States Court of Appeals for the District of Columbia Circuit had exclusive jurisdiction over the action. The United States Court of Appeals for the Fifth Circuit affirmed. *Bywater Neighborhood Association v. Tricarico*, 879 F.2d 165 (5th Cir. 1989). Crescent City has now completed construction of its television tower in the Bywater Historic District, although the FCC has not yet ruled on Crescent City's application for a broadcasting license.

SUMMARY OF THE ARGUMENT

This Court should grant the petition for a writ of certiorari because (1) the Fifth Circuit's decision is in

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[4] Under Section 106 of NHPA, 16 U.S.C. § 470f, the FCC "shall . . . prior to the issuance of any license . . . take into account the effect of the undertaking" on historic resources "included in or eligible for inclusion in the National Register." Under NEPA, the FCC is required to prepare an environmental assessment or environmental impact statement considering the impacts of a project on historic resources prior to allowing a project to go forward. 42 U.S.C. §§ 4331(b)(4), 4332.

direct conflict with a decision by the Third Circuit, and (2) the Fifth Circuit misconstrued the jurisdictional framework established by Congress for judicial review of agency noncompliance with NHPA and NEPA.

ARGUMENT

I. Certiorari Should Be Granted to Resolve a Conflict Between the Fifth and Third Circuits Regarding the Jurisdiction of District Courts to Enforce NHPA and NEPA Compliance by Federal Agencies.

This Court should grant the petition for a writ of certiorari because the Fifth Circuit's decision below conflicts with the Third Circuit's decision in *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231 (3d Cir. 1980), *cert. denied sub nom. General Public Utilities Corp. v. Susquehanna Valley Alliance*, 449 U.S. 1096 (1981).

The Fifth Circuit held that the district court did not have jurisdiction over the Neighborhood Association's action to enjoin the construction of a television tower in a designated historic district. The court reached that conclusion despite the Neighborhood Association's allegation that the FCC was allowing potentially harmful construction to occur without any compliance with the requirements of NHPA or NEPA.

The Fifth Circuit based its decision on Section 402(b)(6) of the Communications Act, which provides that the United States Court of Appeals for the District of Columbia Circuit has exclusive jurisdiction over challenges to FCC orders "granting or denying any [license or

permit] application." 47 U.S.C. § 402(b)(6).[5] The court held that the Neighborhood Association's action fell within that jurisdictional provision. The court noted, however, that the FCC had not yet issued any "final orders" that would trigger the exclusive statutory review. *Bywater*, 879 F.2d at 169. The Neighborhood Association, the court held, would have to await such an order before it could bring a challenge in the United States Court of Appeals for the District of Columbia Circuit under Section 402(b)(6). Thus, the Fifth Circuit denied the Neighborhood Association any judicial forum in which to dispute the construction of the tower prior to the FCC's issuance of a final licensing decision.

Faced with similar facts, the Third Circuit reached a different conclusion in *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231 (3d Cir. 1980), *cert. denied sub nom. General Public Utilities Corp. v. Susquehanna Valley Alliance*, 449 U.S. 1096 (1981).[6] In that case, the plaintiffs sought to enjoin, pursuant to NEPA, the construction and operation of a system for decontamination of radioactive water by operators of a nuclear power plant. The NRC had authorized the construction of the system without requiring the operators to apply for a construction permit. *See Susquehanna Valley Alliance v.*

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[5] The Fifth Circuit also noted that the Administrative Orders Review Act, 28 U.S.C. § 2342 (the "Hobbs Act"), vests exclusive jurisdiction over appeals from the FCC's "final orders" in the circuit courts of appeals. *Bywater*, 879 F.2d at 167.

[6] Then-Associate Justice Rehnquist, joined by then-Chief Justice Burger and Justice Powell, dissented from the denial of certiorari in *Susquehanna*. 449 U.S. at 1096-1101.

Three Mile Island Nuclear Reactor, 485 F. Supp. 81, 83 (M.D. Pa. 1979). The Third Circuit noted that although the plaintiffs could seek review in the courts of appeals of final NRC licensing orders pursuant to the jurisdictional provisions of the Hobbs Act and the Atomic Energy Act,[7] the NRC had not yet issued such a final order. *Susquehanna*, 619 F.2d at 241.

The Third Circuit was troubled by this gap in judicial review because it recognized that the timing of NEPA compliance can be extremely important, "especially when private parties are permitted by a federal agency to make major construction expenditures in advance of consideration of environmental issues." *Id.* The court therefore held that "a claim that NRC is not complying with the National Environmental Policy Act [in allowing construction prior to the issuance of a final order] states a cause of action over which the district courts have subject matter jurisdiction." *Id.*

The Fifth and Third Circuit decisions present a clear conflict. Although they involved different agencies, they both interpreted similar special review statutes that vest exclusive review of final licensing orders in the courts of appeals. In addition, they both addressed the scope of district court jurisdiction over NEPA claims arising prior to the issuance of final orders by an agency. Whereas the Fifth Circuit denied any judicial review of those claims until the agency issues a final licensing decision, and then only in the United States Court of Appeals for the District of Columbia Circuit, the Third Circuit held that district

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[7] *See* 28 U.S.C. § 2342 (1982) (Hobbs Act); 42 U.S.C. § 2239 (1982) (Atomic Energy Act).

courts have jurisdiction to hear those claims. This Court should resolve that conflict.[8]

A resolution of that conflict would allow this Court to eliminate some of the pervasive uncertainty regarding the scope of district court jurisdiction over pre-licensing challenges to agency action or inaction.[9] This uncertainty

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[8] The decision below also is inconsistent with several other federal court decisions that have held that district courts have jurisdiction over challenges to agency noncompliance with NEPA despite the existence of a special review statute. *See, e.g., West Chicago, Ill. v. NRC*, 701 F.2d 632, 652 (7th Cir. 1983) (district court has jurisdiction to hear challenge to agency's noncompliance with NEPA "[w]hen there has been no final agency action permitting review in the court of appeals") (dicta); *City of Irving v. FAA*, 539 F. Supp. 17, 34 (N.D. Tex. 1981) (district court had jurisdiction over NEPA challenge of FAA's decision not to issue an environmental impact statement where there was no agency order to review); *Harlem Valley Transp. Assn. v. Stafford*, 360 F. Supp. 1057, 1062-63 (S.D.N.Y. 1973) (action to enforce agency compliance with "plain legal requirement" of NEPA within jurisdiction of district court despite ICC statutory review provision), *aff'd*, 500 F.2d 328, 334 (2d Cir. 1974); *Izaak Walton League v. Schlesinger*, 337 F. Supp. 287, 291 (D.D.C. 1971) (district court had jurisdiction because the plaintiffs were "not requesting review of the granting or denying of a license").

[9] *See generally Telecommunications Research and Action Center v. FCC*, 750 F.2d 70, 74-75 (D.C. Cir. 1984) (hereinafter, *TRAC*) ("[O]ur precedent concerning jurisdiction over interlocutory appeals from agency action (or inaction) is somewhat confusing for litigants attempting to select the proper forum for these claims."); *Local 1928 v. Federal Labor Relations Authority*, 630 F. Supp. 947, 950 (D.D.C. 1986) ("subject matter jurisdiction in controversies involving administrative agencies has been an issue that has caused significant confusion"); *Suburban O'Hare Commission v. Dole*, 603 F. Supp. 1013, 1017-18 (N.D. Ill.

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is especially problematic where, as here, the basis for the challenge is agency noncompliance with mandatory environmental review statutes. Clarification in this area is essential if litigants are to understand both when and where they should seek judicial review and if environmental review statutes are to be properly enforced.

II. The Fifth Circuit's Denial of Any Judicial Forum in Which to Challenge the FCC's Noncompliance with NHPA or NEPA Prior to the FCC's Issuance of a Final Licensing Order Is Contrary to Statutory Grants of Jurisdiction as Interpreted by the Courts.

The decision below erroneously denied the Neighborhood Association any forum in which to seek prelicensing enforcement of NHPA and NEPA. The decision, by misconstruing jurisdictional provisions in the Communications Act and the Hobbs Act, ignored the well-established jurisdiction of the district courts to enforce mandatory environmental review statutes.

A. Absent a Specific Statutory Review Provision, District Courts Have Jurisdiction Over Challenges to Agency Noncompliance with NHPA and NEPA.

The Administrative Procedure Act provides that administrative actions are presumptively subject to

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1985) ("Courts have encountered substantial difficulty in determining when a challenged administrative action falls within the scope of a statute directing exclusive review in the Court of Appeals.").

judicial review. *See* 5 U.S.C. § 702 (1988). This presumption applies to agency inaction where an agency has a nondiscretionary duty to act. *See* 5 U.S.C. § 551(13) ("agency action" defined to include "failure to act").[10]

Congress may, of course, specifically designate the judicial forum for such review. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958); *City of Rochester v. Bond*, 603 F.2d 927, 931 (D.C. Cir. 1979). Enforcement actions under NHPA and NEPA, for example, may properly be reviewed in the courts of appeals when the action is a challenge to an agency order that is subject to statutory review. *See, e.g., Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 535 (1978); *Connecticut Trust for Historic Preservation v. ICC*, 841 F.2d 479, 480-81 (2d Cir. 1988).

Where a challenge to agency action does not fall within the scope of a specific statutory review provision, however, " 'nonstatutory' review may be sought in the district court under any applicable jurisdictional grant." *City of Rochester*, 603 F.2d at 931. Thus, when an agency, through inaction, fails to comply with NHPA or NEPA, and the statutory review provisions do not apply, review

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[10] Agency compliance with NHPA or NEPA is not discretionary. 42 U.S.C. § 4332 (agencies "shall" comply with NEPA "to the fullest extent possible"); 16 U.S.C. § 470f (agency "shall . . . take into account the effect of the undertaking on [historic resources]"). *See also Robertson v. Methow Valley Citizens Council*, 109 S. Ct. 1835, 1845 (1989) (NEPA is an "action-forcing" statute); *United States v. 162.20 Acres of Land, More or Less*, 639 F.2d 299, 302 (5th Cir.), *cert. denied*, 454 U.S. 828 (1981) (NHPA is "mandatory").

may be sought in the district courts pursuant to other jurisdictional statutes.[11]

Three separate statutes, all of which the petitioner invoked in its complaint,[12] provide for district court jurisdiction over enforcement actions under NHPA and NEPA. Significantly, Congress, in NHPA, expressly created a private right of action which may be "brought in any United States district court by any interested person to enforce the provisions of [NHPA]." 16 U.S.C. § 470w-4. *See also Vieux Carre Property Owners, Residence & Associates, Inc. v. Brown*, 875 F.2d 453, 457-58 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 720 (1990). Further, an enforcement action under NHPA or NEPA presents a federal question, *see, e.g., Defenders of Wildlife v. EPA*, 688 F. Supp. 1334, 1343 (D. Minn. 1988), and Congress has given district courts original jurisdiction over federal questions. *See* 28 U.S.C. § 1331 (1982). Also, where an agency fails to comply with its nondiscretionary duties under NHPA or NEPA, Congress has provided for enforcement actions in the nature of mandamus in the district courts. *See* 28 U.S.C. § 1361 (1982); *Harlem Valley*, 360 F. Supp. at 1063. These jurisdictional provisions clearly allow enforcement of NHPA and NEPA in the district courts.

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[11] *Cf. TRAC*, 750 F.2d at 72 (appellate courts have exclusive jurisdiction over challenges to agency inaction "that might affect [the courts'] future statutory power of review"). Unlike the claim at issue in *TRAC*, here "the underlying claim is not subject to the jurisdiction of the Court of Appeals (and thus adjudication of the claim in the District Court will not affect any future statutory review power of the Circuit Court)." *Id.* at 78. Because "a denial of review in the District Court will truly foreclose all judicial review," district court jurisdiction is appropriate. *Id.*

[12] The complaint in this case specifically pleaded jurisdiction under 16 U.S.C. § 470, *et seq.* and 28 U.S.C. §§ 1331, 1361. *See* Complaint at ¶ 5. The complaint is attached to this brief as an appendix.

B. The Neighborhood Association's Action Does Not Fall Within the Special Review Provisions of the Communications Act or the Hobbs Act Because the Neighborhood Association Is Not Challenging an FCC Licensing Decision or Other Final Order.

In holding that the district court lacked jurisdiction over the Neighborhood Association's action, the Fifth Circuit cited two special review statutes – Section 402(b) of the Communications Act, 47 U.S.C. § 402(b), and the Hobbs Act, 28 U.S.C. § 2342. *Bywater*, 879 F.2d at 167. Section 402(b) of the Communications Act vests exclusive jurisdiction over appeals from FCC licensing decisions in the United States Court of Appeals for the District of Columbia Circuit. The Hobbs Act provides that the circuit courts of appeals have exclusive jurisdiction to review other FCC "final orders." Neither of those review statutes is applicable in this case.

The Fifth Circuit specifically found that the Neighborhood Association's claims fell within Section 402(b)(6) of the Communications Act, which provides that the United States Court of Appeals for the District of Columbia Circuit has exclusive jurisdiction over appeals from FCC orders "granting or denying any [license or permit] application." Although the court recognized that the FCC had not yet issued an order granting or denying Crescent City's broadcasting license application, 879 F.2d at 169, the court apparently determined that the "purpose" of the Neighborhood Association's suit was to challenge the FCC's *future* licensing decision. *Id.* at 166.

The Fifth Circuit's conclusion cannot be squared with the plain language of the Neighborhood Association's

complaint. The complaint explicitly challenged only the FCC's allowance of construction of the television tower, and not the issuance of an FCC license – indeed, none has been issued. The complaint specifically alleged that the FCC violated NHPA by failing to consider historic and cultural impacts and to consult with the Advisory Council on Historic Preservation prior to allowing construction of the television tower. Complaint at ¶¶ 1, 21, 22, 25-31. The complaint also alleged that allowing construction of the tower without preparation of an environmental assessment was unlawful under NEPA. *Id.* at ¶¶ 1, 32-38. Moreover, the relief sought in the complaint is an injunction against "any steps toward construction of this tower . . . until such time as all defendants comply with the requirements of federal law." *Id.* at ¶ 1. *See also id.* at ¶¶ 39-40.

Thus, contrary to the Fifth Circuit's reasoning, the agency action at issue here – allowing construction of the tower without compliance with NHPA or NEPA – is not an "order of the Commission granting or denying any application" subject to exclusive review in the United States Court of Appeals for the District of Columbia Circuit under 47 U.S.C. § 402(b)(6) because the decision to allow construction is separate from the licensing decision. *See, e.g., Waterway Communications Systems, Inc. v. FCC*, 851 F.2d 401, 403 (D.C. Cir. 1988) (D.C. Circuit did not have jurisdiction to review FCC's denial of pre-licensing petition; "[R]elief . . . under § 402(b) requires as a trigger the grant or denial of a license application."). *See also*

Campos v. FCC, 650 F.2d 890, 893 (7th Cir. 1981) ("[I]t is well settled that Section 402(b) is to be narrowly construed and confined to the enumerated categories.") (citing *FCC v. Columbia Broadcasting System*, 311 U.S. 132 (1940)).

Similarly, the Neighborhood Association's action does not fall within the exclusive jurisdiction of the courts of appeals under the Hobbs Act. The Hobbs Act provides only for review of the FCC's "final orders," and the Fifth Circuit expressly recognized that the FCC has not yet issued a final order in this case. *Bywater*, 879 F.2d at 169. *See also, e.g., West Chicago, Ill. v. NRC*, 701 F.2d 632, 652 n.21 (7th Cir. 1983) (exclusive review provisions of Hobbs Act do not apply to agency action that does not constitute final order). The Hobbs Act simply does not address the appropriate forum for reviewing the FCC's complete failure to comply with its mandatory duties under NHPA and NEPA.

The Fifth Circuit may have recognized that the above special review statutes do not encompass the Neighborhood Association's claim and yet construed those statutes broadly to preclude *any* judicial review of challenges to FCC decisionmaking prior to the agency's issuance of a final licensing decision or other final order. *See Bywater*, 879 F.2d at 169. If so, the Fifth Circuit violated this Court's oft-repeated instruction that, absent clear congressional intent, a jurisdictional statute should not be construed to deny judicial review of agency decisions not

directly covered by the statute. *See, e.g., Lindahl v. Office of Personnel Management*, 470 U.S. 768, 778 (1985).[13]

Because the jurisdiction of the district courts to hear actions arising from the FCC's failure to fulfill its non-discretionary duties under NHPA and NEPA is not abrogated by any statutory provision, district courts should retain their customary jurisdiction over such actions.[14]

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[13] The Fifth Circuit's reliance on this Court's decision in *FCC v. ITT World Communications, Inc.*, 466 U.S. 463 (1984), is misplaced. In that case, this Court held that "litigants may not evade these [exclusive jurisdiction] provisions by requesting the District Court to enjoin action that is the outcome of the agency's order." *Id.* at 468. The plaintiffs in that case brought an action in the district court to enjoin certain FCC activities as ultra vires instead of challenging an FCC decision concerning those activities in a court of appeals. By contrast, as the Fifth Circuit recognized, here there is no final licensing decision by the FCC from which the Neighborhood Association can appeal. *Bywater*, 879 F.2d at 169. Moreover, the Neighborhood Association is not challenging FCC action that is connected with the outcome of the FCC's eventual licensing decision.

[14] *See* note 8, *supra*. *See generally Leedom v. Kyne*, 358 U.S. 181, 183-85 (1958) (district court had general jurisdiction over action despite statutory review provision where action was not a challenge to a "final order" of the agency); 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 3943 at 324 (1977) (Absent a specific provision in a special review statute for court of appeals jurisdiction over the action, "the matter must be taken to a district court, ordinarily for injunctive or declaratory relief."); Note, *The Forum for Judicial Review of Administrative Action: Interpreting Special Review Statutes*, 63 B.U.L. Rev. 765 (1983) ("Agency action that is not of the limited class of actions enumerated in the [special review] statute may be reviewed in the district courts.").

C. District Court Jurisdiction is Appropriate Here Because Review Pursuant to the Special Review Statutes is Inadequate and Inefficient In This Case.

Courts traditionally have considered both the adequacy of judicial review and judicial efficiency when construing the respective jurisdiction of courts of appeals and district courts over challenges to agency action or inaction. *See, e.g., Florida Power and Light Co. v. Lorion,* 470 U.S. 729, 741-42 (1985); *Susquehanna,* 619 F.2d at 240-41; *Izaak Walton League,* 237 F. Supp. at 292-93. Here, those considerations weigh in favor of district court jurisdiction.

First, the Fifth Circuit's confinement of judicial review to the courts of appeals allows irreparable environmental harm to occur before the FCC issues an order triggering appellate review. In this case, Crescent City has been allowed to construct a 200-foot television tower that adversely affects the character of a historic district listed in the National Register of Historic Places. This irreparable injury occurred without notice to interested parties, without consultation with the State Historic Preservation Officer,[15] and without the preparation of an environmental assessment or environmental impact statement.[16]

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[15] The State Historic Preservation Officer is a "key participant" in the process of considering impacts to historic sites. Advisory Council on Historic Preservation, 36 C.F.R. § 800.1(c)(ii) (1988).

[16] The All Writs Act, 28 U.S.C. § 1651 (1982), does not furnish the courts of appeals with a mechanism for protecting the public from this irreparable environmental harm. That Act provides that federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions." Here, a court of appeals could not grant the relief requested in the

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Second, the Fifth Circuit's restriction of jurisdiction to appellate courts undermines interests of judicial economy, and will inevitably result in bifurcated proceedings. Enforcement actions under NHPA and NEPA, brought when an agency has failed to act, generally do not have an existing administrative record on which a court of appeals can base its review, and therefore require fact-finding, which the district courts are better suited to perform. *Susquehanna*, 619 F.2d at 241.[17] Thus, appellate

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(Continued from previous page)

complaint – an injunction to prevent Crescent City's pre-licensing construction of the tower before the FCC has complied with NHPA and NEPA. Rather, as the Fifth Circuit acknowledged, under the FCC's "one-step" licensing procedure for microwave television towers, the FCC allows construction (as opposed to operation) of the tower to take place without an "order" over which the court of appeals would have jurisdiction. At most, a court of appeals could protect its jurisdiction to review the FCC's eventual decision to issue an operating license for the tower, which raises issues separate and distinct from the environmental impacts of the tower construction. "The All Writs Act is not an independent grant of jurisdiction to a court; it merely permits a court to issue writs in aid of jurisdiction acquired to grant some other form of relief." *TRAC*, 750 F.2d at 77 (citing *Stern v. South Chester Tube Co.*, 390 U.S. 606, 608 (1968)).

[17] *Cf. Friends of Sierra Railroad, Inc. v. ICC*, 881 F.2d 663 (9th Cir. 1989), *petition for cert. filed sub nom. Tuolumne Park and Recreation District v. ICC*, 58 U.S.L.W. 3336 (Oct. 30, 1989) (No. 89-701). In *Friends of Sierra Railroad*, the Ninth Circuit deferred to the agency's unilateral factual determination that, while the agency had not complied with NHPA, the State Historic Preservation Officer had received notice of the agency action requiring NHPA review and had failed to object to the action within the statutory period. *Id.* at 669. Independent fact-finding by the district court would have revealed that the agency in fact did not provide adequate notice to the State Historic Preservation Officer.

review will necessarily require a remand to the district court or a special master to resolve these factual issues. *See TRAC*, 750 F.2d at 78 (citing *ITT World Communications*, 466 U.S. at 469). The route prescribed by the Fifth Circuit, therefore, would necessarily involve three separate court proceedings: initial review by the court of appeals, a remand to the district court or a special master for fact-finding, and a merits review by the court of appeals. The review urged by the Neighborhood Association, by contrast, could be satisfactorily concluded at the district court level.

Because review in the courts of appeals pursuant to the special review provisions is inadequate and inefficient in this case, the Fifth Circuit erred in holding that the district court lacked jurisdiction to hear the Neighborhood Association's claims.

CONCLUSION

For the foregoing reasons, the National Trust for Historic Preservation in the United States respectfully requests that this Court grant the Bywater Neighborhood Association's petition for a writ of certiorari.

Respectfully submitted,

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February 7, 1990

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

BYWATER NEIGHBORHOOD ASSOCIATION	*	
	*	
versus	*	
WILLIAM J. TRICARICO, in his capacity as SECRETARY, FEDERAL COMMUNICATIONS COMMISSION and CRESCENT CITY COMMUNICATIONS COMPANY, INC., OF DELAWARE and NOTEL, INC.	*	CIVIL ACTION NO. 88-5086

COMPLAINT FOR DECLARATORY JUDGMENT, TEMPORARY RESTRAINING ORDER, PRELIMINARY AND PERMANENT INJUNCTIONS

By this action plaintiff requests this Honorable Court to declare unlawful the failure and refusal by William J. Tricarico as Secretary, Federal Communications Commission, to require, for the construction of a 195 ft. STL Tower at 620 Desire Street, New Orleans, Louisiana and for a new domestic satellite earth station at 3200 Chartres Street, New Orleans, Louisiana in the Bywater Historic District such consultation with the Advisory Council on Historic Preservation as required by the law and regulations prescribing the duties of that Council, and as required by F.C.C. regulations. Plaintiff further requests that this Court declare unlawful the failure of the Secretary to require an Environmental Assessment for the STL Tower. Plaintiff further prays that this Court preliminarily and permanently enjoin any steps toward construction of this tower (including those which may be taken by

the defendants or those acting in concert with them), until such time as all defendants comply with the requirements of federal law. Plaintiff further requests that this Court order, by ~~manda~~tory injunction, the removal of the domestic satellite earth station until defendants comply with the law and regulations prescribing the duties of that Council, and until the environmental impact of that facility is properly assessed.

2.

Crescent City Communications Company, Inc., of Delaware has applied to the Federal Communications Commission for Authorization in the Auxilliary Radio Broadcast Services to broadcast from a TV Microwave Station STL tower to be constructed to a height above ground of 195 to 200 feet at 620 Desire Street, New Orleans, Louisiana. That location is entirely within the Bywater Historic District, so listed in the National Register of Historic Places by the U.S. Department of the Interior.

3.

NOTEL, Inc. has applied to the Federal Communications Commission for Authorization to install a new domestic satellite earth station at 3200 Chartres Street, New Orleans, Louisiana. That location is also entirely within the Bywater Historic District, so listed in the National Register of Historic Places.

4.

Crescent City Communications, the permittee of Television Station WCCL, Channel 49, is related to NOTEL, Inc., insofar as the majority shareholder, President and director of Crescent City Communications is the President of NOTEL, and a shareholder in the minority corporate shareholder of NOTEL. The facilities of NOTEL and Crescent City that are at issue herein are across the street from each other and are planned to provide different components for broadcasting, receiving and transmitting that will operate in conjunction with each other.

JURISDICTION

5.

This Court has jurisdiction under 28 U.S.C. § 1331 (Federal Question Statute); 5 U.S.C. § 701 *et seq.* (the Administrative Procedure Act); 28 U.S.C. 1361 (the Mandamus and Venue Act of 1962); 28 U.S.C. § 2201 *et seq.* (the Declaratory Judgment Act); 42 U.S.C. § 4321 *et seq.* (the National Environmental Policy Act of 1969); 16 U.S.C. § 470 *et seq.* (the National Historic Preservation Act of 1966); and all regulations promulgated thereunder. The amount in controversy with respect to plaintiff, exclusive of interest and costs, exceeds ten thousand dollars.

PARTIES

6.

Plaintiff Bywater [Neighborhood] Association is a non-profit Louisiana corporation domiciled in Orleans Parish. The plaintiff corporation was organized to

encourage the preservation of the distinctive character of the Bywater Section of the City of New Orleans. Many of plaintiff's members reside and/or own real property in that section and avail themselves of that District's aesthetic, recreational and historic features. Plaintiff and its individual members have objected to the construction of the TV Microwave Station STL Tower and satellite earth station and have expressed their objections to the defendants.

7.

Defendant William J. Tricarico, is the Secretary of the Federal Communications Commission (the "FCC"). Pursuant to 47 U.S.C. 301 et seq., the FCC is responsible for considering applications and granting permits in the auxilliary radio broadcast services and for the installation and operation of the satellite earth station.

8.

Defendant, Crescent City Communications Company, Inc. of Delaware ("Crescent City") is a corporation organized under the laws of the State of Delaware. It is authorized to do business in Louisiana and maintains a registered office in Orleans Parish. Crescent City is the applicant for the Authorization for the TV Microwave STL tower.

9.

Defendant, NOTEL, Inc. ("NOTEL") is a corporation organized under the laws of the State of Louisiana. It is

domiciled in Orleans Parish. NOTEL is the applicant for Authorization for installation and operation [of] the satellite earth station.

HISTORY OF APPLICATIONS

10.

By Application dated February 8, 1988 received by the FCC on February 16, 1988, NOTEL sought authorization to operate a "Domestic KU Band Communications Satellite Receive and Transmit Earth Station in New Orleans, Louisiana." A copy of that application is attached hereto as plaintiff's Exhibit A.

11.

In its application, NOTEL, through Clifford Smith, makes the statement that " . . . the construction and operation of the facilities will not affect districts, sites, buildings, structures or objects, significant in American history, architecture, archeology or culture that are listed in the National Register of Historic Places or are eligible for listing."

12.

By application dated June 22, 1988, Crescent City, through its representative advised the FCC of its desire to construct at 620 Desire Street a TV Microwave Station STL tower 195' in height. A copy of that application is attached hereto as plaintiff's Exhibit B. The Application was received by the FCC on July 11, 1988.

13.

As a part of that Application, Crescent City included a "Technical Exhibit" prepared by du Treil, Lundin & Rackley, Inc., of Washington, D.C. That Technical Exhibit is attached hereto as Exhibit C.

14.

In the Application and in the accompanying Technical Exhibit the statement is made that: "The proposed construction appears to be categorically excluded from environmental processing pursuant to Section 1.1306 of the Commission's Rules."

15.

The regulations promulgated by the FCC provide that certain actions are categorically excluded from environmental processing if, among other things, they "do not . . . (I) involve a site location specified under § 1.1307(a)(1)-(5) . . . " 47 CFR § 1.1306 (10-1-87 Edition)[.]

16.

The FCC regulations further provide that "the following types of facilities may significantly affect the environment and thus require the preparation of EA's (Environmental Assessments) by the applicant (see § 1.1308 and 1.1311) and may require further Commission environmental processing (see §§ 1.1314, 1.1315 and 1.1317)[.]

* * *

(3) Facilities that will affect districts, sites, buildings, structures or objects, significant in American history, architecture, archeology or culture, that are listed in the National Register of Historic Places or are eligible for listing. (See 36 CFR Parts 60, 63 and 800)

47 CFR § 1.1307

17.

The Bywater Historic District was entered into the National Register of Historic Places on January 23, 1986. The district includes the location at which the TV Microwave Station STL is proposed for construction and at which the satellite earth station has been installed. Photocopies of the National Register designation and map of the Bywater Historic District are attached hereto as plaintiff's Exhibits D and E, and plaintiff has indicated thereon the locations of the Satellite earth station and the proposed STL tower.

18.

On June 30, 1988, and July 11, 1988, Robert Fink, Chief, Western District of Project Review, Advisory Council on Historic Perservation (the "Advisory Council") wrote to the Secretary, FCC regarding the construction of the proposed tower, and reminding him of his obligations under NHPA. A copy of those letters is attached as plaintiff's Exhibit F and G.

19.

In response thereto Mr. Fink received a reply dated July 27, 1988 from Eileen Chaney of the of the [*sic*] Consumer Assistance and Small Business Division, Office of Public Affairs, FCC confirming that "there is a pending application for a TV-STL, File Number BPTS-880711ME, to be located at 620 Desire St." Ms. Chaney indicated further only that she was forwarding Mr. Fink's letter to the FCC Mass Media Bureau, Auxilliary Services. A copy of her letter is attached hereto as plaintiff's Exhibit H.

20.

Mr. Fink wrote again to Ms. Chaney on November 1, 1988, and photocopy of that letter is attached as plaintiff's Exhibit I.

21.

The FCC has taken no steps to evaluate the impact of this project on the Bywater Historic District, to prepare an Environment Assessment (EA) of it, nor to undertake and implement consultation regarding the historic preservation implications of the project with the Advisory Council and State Historic Preservation Officer. The Environmental Impact Statement prepared for the satellite earth station is erroneous in that it concludes that its construction and operation will not affect buildings, sites, etc. listed in the National Register of Historic Places.

22.

For the reasons stated below, the failure by the FCC to consult with the Advisory Council on Historic Preservation and to take such other action required for this project is arbitrary, capricious, in bad faith, abusive of the discretion, unreasonable and in violation of the procedure required by law. Consequently, defendants are without requisite authority to proceed with this project.

23.

The STL tower has not been erected; though a base for it has been installed.

24.

The dishes for the satellite earth station have been installed.

FIRST CAUSE OF ACTION

25.

The National Historic Preservation Act of 1966 ("NHPA"), as amended, 16 U.S.C. § 470, *et seq.*, established the Advisory Council on Historic Preservation (the "Council") as an independent agency of the United States to advise the President and the Congress on historic preservation matters; to recommend measures to coordinate Federal historic preservation activities; and to comment on Federal actions affecting properties included in or eligible for inclusion in the National Register of Historic Places (the "National Register").

26.

Section 106 of the Act, as amended (16 U.S.C. § 470 f) requires that federal agencies with direct or indirect jurisdiction over a federal, federally assisted or federally licensed undertaking afford the Council a reasonable opportunity for comment on such undertakings that affect properties included in or eligible for inclusion in the National Register, prior to the agency's approval of any such undertaking. Federal Regulations have been promulgated to define this process, 36 CFR § 800 et. seq.

27.

In accordance with 36 C.F.R. Part 61.2, the Governor of Louisiana has appointed a State Historic Preservation Officer ("SHPO"), who, in cooperation with federal agency officers, is responsible for administering the Act within this State. Ultimate responsibility for compliance lies with the federal officer.

28.

As implemented in 36 C.F.R. Part 800, the Section 106 process is a public interest process in which the federal agency proposing, funding or licensing an undertaking, the SHPO and the Council and interested organizations and individuals participate. The process is designed to assure that alternatives to avoid or mitigate an adverse effect on a National Register property are adequately considered in the planning process. The regulations are binding on all federal agencies and specify the manner in which the Council will render its comments to federal

agencies when their undertakings affect properties included in or eligible for inclusion in the National Register. (See *Federal Register,* Volume 44, p. 6068 et seq.)[.]

29.

It is the duty of the responsible federal officer (herein defendant Tricarico), in conjunction with the SHPO, to develop an adequate record for review by the Advisory Council.

30.

The Domestic Satellite Earth Station and TV Microwave STL tower are projects licensed by the FCC. As a result, defendant Tricarico is subject to the provisions of the National Historic Preservation Act and Regulations promulgated in connection therewith.

31.

Defendant Tricarico made no effort to investigate thoroughly and in good faith the project's likely impact on historically and culturally significant properties in the vicinity of the project, in violation of the Act and of Part 800 of Title 36 of the Code of Federal Regulations. Those properties consist of the Bywater National Historic District.

SECOND CAUSE OF ACTION

32.

The National Environmental Policy Act of 1969 (42 U.S.C. § 4321 *et seq.*) provides, *inter alia,* that it is the

continuing responsibility of the Federal government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate federal functions and resources to the end that the Nation may

A. Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

B. Assure for all Americans esthetically and culturally pleasing surroundings; and

C. Preserve important historic, cultural, and natural aspects of our national heritage (42 U.S.C. § 4331 (b)).

33.

The FCC has not taken into consideration the environmental amenities and values pertinent to this activity. Indeed, the FCC has failed to observe that any National Register sites are affected by the facilities described in the Application.

34.

The National Environmental Policy Act ("NEPA") further required the FCC to assess the probable impact of the project on the human environment.

35.

If the project constitutes a major federal action, Section 102(2) (C) of NEPA (42 U.S.C. § 4332(2) (C)) obliged

the FCC to prepare an Environmental Impact Statement (EIS) for the project prior to issuing a permit.

36.

No EA has been prepared for the STL tower by the FCC, and the "Environmental Impact Statement" for the satellite earth station is wrong on its face.

37.

Furthermore, the FCC did not follow its own Regulations governing assessment of environmental impacts. 47 CFR § 1.1307[.]

38.

The Administrative Record for the STL tower contains no "Environmental Assessment".

THREAT OF IMMEDIATE, IRREPARABLE INJURY

39.

FCC has authorized the construction and installation of both the Domestic Satellite Earth Station and TV Microwave STL tower. The FCC contemplates no further action or scrutiny of this project prior to the construction of the tower.

40.

The STL tower is scheduled for construction and operation and that construction is imminent.

WHEREFORE, plaintiff prays:

I. That the Court render a declaratory judgment decreeing: That Secretary, William J. Tricarico, in his official capacity as Secretary of the Federal Communications Commission[,] has failed to comply with the provisions of the National Historic Preservation Act; and the National Environmental Policy Act, and all FCC and Advisory Council regulations promulgated thereunder;

II. That this Court issue a Temporary Restraining Order and Preliminary Injunction, with nominal bond, and in due course a Permanent Injunction, enjoining the FCC and Crescent City Communications Company, Inc. of Delaware, their officers, agents, employees, servants, contractors, attorneys, and all others in active concert with them from:

> The construction and operation of the TV Microwave STL tower at 620 Desire Street, New Orleans, Louisiana;

III. That this Court issue a Preliminary Mandatory Injunction and in due course a Permanent Mandatory Injunction enjoining the FCC and NOTEL, Inc., their officers, agents, servants, contractors, attorneys and all others in active[ ] concert with them, ordering them to remove the domestic satellite earth station at 3200 Chartres Street, New Orleans, Louisiana.

IV. That this Court award plaintiff its attorney's fees, expert witness fees, court costs and incidental expenses.

V. All other legal and equitable relief.

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